

Restructuring and Insolvency Jurisdiction Guide: BVI

Insights - 20/05/2024

Domestic Procedures

- Liquidation:
insolvent,
voluntary or
compulsory
- Creditors'
Arrangement
- Scheme of
Arrangement

What are the principal insolvency procedures for companies in your jurisdiction?

Plans of Arrangement and solvent liquidations are outside the scope of this summary.

Receivership is dealt with in the Insolvency Act 2003 (**the Act**), but is a method of enforcement for secured creditors, not an insolvency

procedure. Part III

procedure. Part III of the Act, dealing with administration, is not in force.

Are any of the procedures available on a provisional basis?

Yes. A provisional liquidator can be appointed if: (i) an application to appoint a liquidator (with good arguable grounds) has been made but not yet determined; and (ii) the company consents or the Court is satisfied that: it is necessary for the maintenance of assets; or it is in the public interest. Importantly, following the decision in *Constellation Overseas Ltd* BVIHC COM 2018/206, a “light-touch” or “soft-touch” provisional liquidator can be appointed in aid of restructuring.

Compulsory liquidation

- Application by: the company; a creditor; a

member; the supervisor of an arrangement; the FSC; or the Attorney General

- Potential grounds are:
the company is insolvent; the Court considers it just
- and equitable;
or that it is in the public interest
- A company is insolvent where:

i) it fails to comply with, or set aside, a statutory demand

ii) execution or process of a judgment, decree or order is returned unsatisfied

iii) the company

is unable

to pay its

to pay its
debts as
they fall
due; or
iv) the
value of its
liabilities
exceeds
that of its
assets

What requirements are to be satisfied for the procedures to be pursued?

- The application must be served at least 14 days before the hearing and is typically heard on specified Liquidation Days (usually one or two Mondays per month)
- It must be advertised (in the BVI and in any jurisdiction appropriate to bring it to the attention of creditors) not less than 7 days after service and not less than 7 days before the hearing
- The application must be determined within 6 months of

issuing unless,
before then, an
extension is
granted

Insolvent

voluntary

liquidation

Resolution of 75%
of the members
(unless the M&As
require a higher
%); the prior
written consent of
a BVI licenced IP;
and no pending
application before
the Court to
appoint a
liquidator.

Creditors'

Arrangement

The company must
be insolvent and a
75% majority by
value of creditors
must approve the
arrangement.

Scheme of

Arrangement

A scheme has to be
approved by a
majority in number
and 75% in value of
the creditors.

Liquidations

The liquidator:

- Must, within 14
days of
appointment:

advertise their appointment;
file a notice of appointment with the Registrar; and
serve notice on the Company

- Must, within 21 days of appointment, hold a meeting of creditors
- Take possessions of, protect and realise the Company's assets; distribute the assets or the proceeds of their realisation to creditors; and distribute any surplus to the members
- Provide to all creditors and the Registrar a final report

Depending upon the nature of the assets and the adjudication of claims by creditors, the procedure can take from a few

What is the procedure and how long does it typically take?

months to many years.

Creditors'

Arrangement

A proposal is made between creditors and the company.

An interim supervisor is appointed (with notice to the Registrar). A creditors' meeting occurs to approve the arrangement. A supervisor is appointed (with notice to the Registrar) in order to implement the arrangement. Any modification of the initial proposal requires adjournment of the creditors' meeting.

The time taken depends on the compliance and agreement of the creditors but can be relatively quick.

Scheme of

Arrangement

This is a three stage process: a Court hearing convening the creditors' meeting, followed by the

	<p>creditors meeting and then a hearing to seek sanction by the Court. The process can be relatively quick, subject to the notice requirements for the meeting (usually not less than 14 days).</p>
<p>Can any procedures be pursued without the involvement of the Court?</p>	<p>Yes: voluntary insolvent liquidation does not necessitate the involvement of the Court. Also, a Creditors' Arrangement can be pursued without the involvement of the Court.</p>
	<p>Liquidation</p> <p>Upon appointment (by the members or the Court) the liquidator has custody and control of the assets of the company. The powers of the directors and members of the company cease, save for very limited exceptions.</p>

What is the effect upon control of the company and its assets during those procedures?

Provisional liquidation in aid of restructuring

The day-to-day management of the company is generally left to the directors and managers of the company, subject to the terms of a Court-approved protocol and the supervision of the provisional liquidator.

Creditors' Arrangement and Scheme of Arrangement

The only effects are those agreed between the company and the creditors.

Is there an automatic moratorium and if so when does it come into effect and what is its effect?

Yes. Upon the appointment of a liquidator no one may continue or commence an action against the company or in relation to its assets or enforce or continue to enforce any right against or over its assets. This does not affect the rights of secured

creditors.

Can companies be forcibly wound up other than when insolvent?

Yes, if:

- It does not have a registered agent
- It fails to file any return, notice or document required to be filed under the Act
- The Registrar is satisfied the company has ceased to carry on business
- The Registrar is satisfied it is carrying on a business of the Virgin Islands without having such licence, permit or authority
- It fails to pay its annual fee or any late payment penalty by the due date; or
- The Court considers it is just and equitable, or in

	the public interest, that it should be wound up
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Traditionally the BVI has essentially been a creditor friendly jurisdiction. The purpose of liquidation is to realise the company's assets and to make distributions according to the priority of creditors. It is not designed to rescue the company and there is no equivalent of Chapter 11 protection from creditors. However, the recent common law development in Constellation Overseas Ltd, permitting provisional liquidation in aid of restructuring, facilitates the restructuring of BVI companies and of multi-jurisdictional groups containing BVI companies.

To what extent are the procedures designed to facilitate a rescue of a company's business?

Additionally, both Creditors' Arrangements and Schemes of Arrangement can facilitate a permanent or temporary rescue of the business.

Can the procedures be used to facilitate the sale of all or part of the insolvent company's business?

A liquidator has the power to sell the business and assets of the company. Either a Creditors' Arrangement or a Scheme of Arrangement could include a proposal for sale.

Cross Border

Statutory recognition: the BVI can provide assistance to overseas appointees from designated "relevant" foreign jurisdictions, being: Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the UK and the USA.

The BVI court will take into account:

- The just treatment of all persons claiming in the foreign proceedings
- Protection of persons in the BVI who may have claims in the foreign proceedings
- Prevention of preferences and fraud
- The need for ranking for foreign claimants to be in order with BVI claimants
- Comity

Permissible orders are very wide:

- Restrain proceedings
- Delivery of property of the company to a foreign representative
- Co-ordinating

To what extent do the courts in your jurisdiction lend assistance to overseas appointees (through recognition) and in what circumstances?

BVI insolvency
with foreign
insolvency; or

- Authorising
the foreign
representative
of any person
who could be
examined in
BVI insolvency
proceedings

Common law
recognition: the
current BVI
position is that
common law
assistance can be
given to overseas
appointees, but
only to those
from the
"relevant"
jurisdictions for
the purposes of
statutory
recognition.

- The BVI Court
cannot grant
any
assistance
that adversely
affects setoff
rights or the
rights of
preferential or
secured
creditors
(without their
consent)

Are there any limitations typically imposed in respect of the recognition of an overseas appointee?

- Under common law assistance, relief will only be granted that is available to the overseas appointee in their home jurisdiction and available at common law in the BVI

What kinds of overseas appointees have been recognised in your jurisdiction?

A Hong Kong trustee in bankruptcy has been recognised. A US receiver was refused recognition on the basis that the receivership was intended to protect US investors and was not for the purpose of a "reorganisation, liquidation or bankruptcy" as required by s. 473 of the Insolvency Act 2003.

No. Although Part XVIII of the Act contains provisions based on the UNCITRAL

Do the courts in your jurisdiction assist in applications to subject a company incorporated in your jurisdiction becoming subject to an insolvency procedure in another jurisdiction?

Model Law on cross-border insolvency, that Part has not been brought into force.

The existence of a foreign insolvency process in respect of a BVI company does not prevent the BVI court appointing a BVI liquidator and, as a matter of common law, the BVI proceedings will be treated as the primary proceedings.

Creditors

Movable property

Shares in a BVI company are the most commonly secured BVI

asset. Typically an equitable charge will be taken over the shares with the title to the shares

What are the principle forms of security taken in your jurisdiction in respect of movable and immovable property?

remaining with the chargor subject to a commercially agreed enforcement scenario.

Immovable property

Land and other immovable property situated in the BVI is not an asset class that is typically the subject of security.

What is the effect on secured creditors of the commencement of an insolvency procedure?

None (without their agreement in writing)

Which creditors are preferred and to what extent?

Employees up to \$10,000 and the BVI Government in varying amounts.

- Fees and expenses are payable out of the estate, subject to Court

What is the position regarding the recoverability and quantum of liquidator's fees and expenses of the insolvency procedure?

Court
assessment

- Typically liquidator's fees charged at market hourly rates. Rarely fixed as a percentage

Avoidance transactions

Potentially
"voidable
transactions"
comprise:

- Unfair preferences
- Transactions at an undervalue
- Voidable floating charges; and
- Extortionate credit transactions

Other than
extortionate
credit
transactions,
the transaction
must be an

“insolvency transaction”: one entered into when the company is insolvent or which causes the company to become insolvent.

The vulnerability period is:

- 2 years prior to the onset of insolvency for a ‘connected person’
- 6 months prior to the onset of insolvency for any other person; and
- 5 years in the case of extortionate credit transactions

“Onset of insolvency” = the date the application to appoint a liquidator was issued or the date the

What if any categories of transaction can be avoided/set aside?

members' resolution was passed.
A "connected person" includes related companies, and directors and members of the company and related companies.

Who is responsible for seeking orders to set aside such transactions?

The liquidator.

Contributions to the liquidation estate and liability of officers

Can directors or shareholders be required to contribute to the liquidation estate?

Yes, in the case of:

- Delinquent officers: misapplication of assets, misfeasance or breach of duty
- Fraudulent trading: intention to defraud creditors or the company had some other fraudulent purpose
- Insolvent

trading:
director knew
or ought to
have known
there was no
reasonable
prospect of
avoiding
insolvency
(unless they
also took every
reasonable
step to
minimise loss
to creditors)

What liability can directors or other officers attract in respect of an insolvent company?

Delinquent officers

Possible orders against delinquent officers are:

- To repay, restore or account for money or other assets
- Pay compensation; or
- Pay interest

Fraudulent trading or insolvent trading

The Court may order the payment of a contribution to the company's

When a director has been convicted on indictment:

- Of an offence in connection with the promotion, formation, management or dissolution of a company that is or becomes insolvent; or
- Of an offence under the Act that related to a company that at any time becomes insolvent

When the director:

- Had an order for fraudulent trading or insolvent trading made against them
- Is guilty of fraud in relation to an insolvent company or of any misfeasance or breach of

In what circumstances can directors be disqualified as a consequence of a company being wound up?

duty to it as a director; or

- In the opinion of the Court, conducted himself as a director of an insolvent company (and other companies) in such manner as to make them unfit to be a director

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